

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

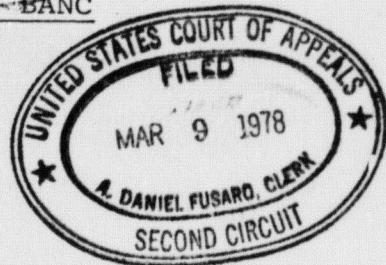
77-1306

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
-against-
CARL BENEDETTO,
Defendant-Appellant.

B
P/s

PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC



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INTRODUCTION

Pursuant to Fed. R. of App. Procedure 35 and 40, Carl Benedetto moves for rehearing of the decision of February 24, 1978, affirming a judgment of the United States District Court for the Southern District of New York, convicting appellant of violating Title 21, U.S. Code, Section 622, and imposing a sentence of 18 months in jail.

THE MOTION FOR REHEARING SHOULD BE
GRANTED BECAUSE IT PRESENTS A SUB-
STANTIAL EVIDENTIARY ISSUE.

The Court's opinion in this case presents a novel and very important evidentiary question pursuant to Walder v. United States, 347 U.S. 62 (1954) and Section 607 of the Federal Rules of Evidence. Walder held that if the defendant, during his trial testimony, attempts to deny not only the crimes charged but other similar crimes as well, the Government is

permitted to resort to extrinsic proof of the similar crimes as a means of impeaching the defendant's credibility. The Walder principle was invoked here, and its application worked a substantial injustice to Mr. Benedetto and will also, in the future, create an intolerable and unworkable situation for trial attorneys whose clients are confronted with extraneous matters going beyond the parameters of the indictment.

Undeniably, the present case differs substantially from Walder. For in this case, the Government resorted to proof of "similar acts" before the defendant was ever even given an opportunity to interpose a defense. Confronted with such proof, which was not relevant to any issue then in dispute at the trial, the defendant, who asserted his innocence during his own testimony, denied committing the crimes charged in the indictment and understandably also denied committing any other similar crimes. Given the Government's proof in its direct case, the latter denial was all but compelled. No self-respecting trial attorney could limit the direct examination of the defendant before a jury to denials of the crimes charged. Benedetto's testimony was the only realistic and reasonable step taken to impress the jury that the crimes charged and similar crimes proof offered by the Government during its direct case was untrue. But, for this, Mr. Benedetto was severely penalized, the Court having held that like Mr. Walder, Mr. Benedetto "opened the door" by testifying to matters beyond the scope of the indictment,

which thus allowed the Government to come back with proof of still additional uncharged crimes.

When it is the Government, as opposed to the defendant, who initially raises the subject of uncharged crimes in a criminal case, the defendant must have the unqualified right to counter this evidence without exposing himself to proof of other criminal conduct not charged in the indictment, proof that can only brand the defendant as a criminal in the eyes of the jury. It is this feature of the case that readily distinguishes it from Walder. In Walder, it was the defendant, not the Government, that initially wandered beyond the indictment. Recognition of the improper extension of Walder to the facts of this case should lead the Court to grant the motion for rehearing.

STATEMENT OF THE CASE

Mr. Benedetto was charged with having received bribes from the officers of four meat processing plants in return for lax enforcement of various government regulations. In addition to offering proof of these alleged bribes, the Government offered the testimony of Arthur Breth that the defendant had received payments from Arthur Breth and Son. Receipt of the payments from Breth was not alleged in the indictment.

Testifying in his own behalf, Mr. Benedetto denied ever having received bribes from the witnesses testifying for the Government or from any other meat packer or processor.

On Cross-examination, Mr. Benedetto was asked if he had ever received money from Herman Lustgarten, an employee of another meat processing plant not mentioned in the indictment, and when Mr. Benedetto denied receiving such payments, the Government, on rebuttal, called Lustgarten, who testified that he had made periodic payments to the defendant.

Mr. Benedetto's principal contention on appeal was that he was denied a fair trial because the Government, through the testimony of Arthur Breth and Herman Lustgarten, offered proof of "similar acts" not mentioned in the indictment. The Government argued that the "similar acts" proof was relevant to Mr. Benedetto's knowledge and intent to commit the crimes charged, and it was on this basis only that the District Judge instructed the jury to consider this evidence. This Court, however, rejected the Government's claim, holding that knowledge and intent were never in dispute at the trial; as a result, the "similar acts" proof could not be offered for the purpose the Government had intended. Nevertheless, the Court affirmed the propriety of the introduction of the "similar acts" proof, stating at slip op. 1742-43:

"What ultimately tips the scale, after reviewing the particular amalgam of facts in this case, is that Benedetto testified on direct examination that he had never taken bribes from anybody. Once a witness (especially a defendant-witness) testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case. See Walder v. United States, 347 U.S. 62 (1954); United States v. Beno, supra, 324 F.2d at 588."

ARGUMENT

I

Essentially, the Court has held that Mr. Benedetto, by denying that he had ever received a bribe in connection with his official duties as a Federal meat inspector, introduced certain collateral matters before the jury, which thus allowed the Government to contradict his answers by extrinsic proof under Walder v. United States. See Fed. R. Evid. 607. To avoid impeachment, Mr. Benedetto, the Court has ruled, should have narrowed his denials to the charges contained in the indictment, even though the Government, through the testimony of Arthur Breth, had offered proof of uncharged crimes outside the indictment before Mr. Benedetto was ever allowed to testify. The Court should reexamine this holding, which, candidly, reflects a serious misunderstanding about how a jury weighs conflicting evidence offered by both sides in a criminal case. Simply stated, it is unreasonable to expect that Mr. Benedetto should limit his testimony within the boundaries of the indictment, when, prior to his having testified, the Government was allowed improperly to go beyond the charges.

The jury knew from the evidence that Mr. Benedetto was a federal meat inspector assigned to inspect several meat processing plants, including plants that were not mentioned in the indictment. If the Government's proof was limited to proving the charges, there would have been no reason for

Mr. Benedetto to go beyond the indictment and make a blanket denial about having never received any bribes in connection with his job as a federal meat inspector. The jury could correctly assume that while Benedetto had made inspections of numerous meat processing plants, he was being charged merely with having taken bribes from the officers of four of these plants and that whether these charges were true was the only issue for the jury to decide. But this was not what happened here.

So far as the jury was concerned, the Government injected a new issue into this case, namely, that Mr. Benedetto had received other uncharged bribes, as revealed by the testimony of Arthur Breth, the first witness to testify to acts not specified in the indictment. This proof told the jury that there was much more involved in this case than simply the four counts contained in the indictment. Involved here, as the jury knew, was the alleged commission by Mr. Benedetto, who the jury also knew was assigned to inspect several meat processing plants, of other uncharged crimes of which Arthur Breth's testimony had provided a sample.

Yet, the Court has held that Mr. Benedetto, confronted by the testimony of Arthur Breth, should have confined his own testimony to the charges contained in the indictment. Slip op. at 1742. It is simply not plausible

to expect that the jury would have been satisfied if Mr. Benedetto merely denied committing the crimes charged in the indictment. After also hearing Breth's testimony, would not the jury have inferred that Mr. Benedetto, who had inspected several meat processing plants, even if innocent of the charges contained in the indictment, had committed other uncharged crimes by taking bribes from officers of other companies who were not mentioned in the indictment? Would not the jury have believed that there existed other Arthur Breths, who, had the Government chosen to call them as witnesses, could have also accused Mr. Benedetto of receiving bribes from their companies? Obviously, the answer to all these questions is yes.

It is absurd to expect the defendant in a criminal case to obey the commands of Section 607 of the Federal Rules of Evidence and Walder v. United States if similar compliance is not forthcoming from the Government. By calling Arthur Breth to the witness stand, the Government planted the idea in the jury's mind that Carl Benedetto had received a number of bribes, including bribes never mentioned in the indictment. Faced with this testimony, it was incumbent upon the defendant whose defense was innocence, if he was to have a chance for an acquittal, to persuade the jury that Breth had not testified truthfully and also that the jury's suspicions about Mr. Benedetto's commission of other uncharged bribes was also unfounded. This, Mr. Benedetto could only do by testifying that he had never been a bribe receiver. In short, he was

compelled to testify that he was innocent of receiving any bribes.

Further, it cannot be argued that Mr. Benedetto invited the testimony of Arthur Breth, when his attorney informed the Court outside the presence of the jury that the defense would call a number of employees of meat packing companies to testify that the defendant had never asked them for bribes. Although the Court does not emphasize this incident, the opinion hints that defense counsel's offer of proof forced the Government to call Breth to the stand before Benedetto testified. This is wrong. Counsel's remarks were not like an opening statement that would have been heard by the jury. If the district judge thought that this offer of proof was defective, he could have precluded counsel from calling these witnesses, and the Government's "need" to call Arthur Breth as a witness would not have existed. Defense counsel's remarks about his intention to call certain defense witnesses were simply irrelevant to the question whether Arthur Breth properly testify to crimes not charged in the indictment.

The Court's holding that the jury could properly consider the "similar acts" under Walder v. United States, is also puzzling, because the district judge never instructed the jury that this evidence should be utilized merely in evaluating Mr. Benedetto's credibility. The district judge

only incorrectly told the jury that the "similar acts" were relevant to the question of whether Mr. Benedetto possessed the requisite intent and knowledge in committing the crimes charged alleged in the indictment. (A138-139).^{*} But the district judge never explained that this proof was relevant to the impeachment of the defendant's credibility. No matter how correct it may have been for the Government to offer proof of "similar acts" under Walder, it was error to place this evidence before the jury without proper limiting instructions. Recognizing this, the Court nonetheless blames defense counsel for the Court's failure to so charge the jury.

Thus, in its opinion, the Court writes that "we find no plain error in the Court's failure to so charge". Slip op. at 1743. Plain error is a device used by federal appellate courts to excuse one party's failure to preserve a particular claim in the trial court, when circumstances so require. Application of this concept to the facts at bar is wholly uncalled for, since the defense was under no obligation, whatsoever, to request that the "similar acts" proof be received under limiting instructions pursuant to Walder. As we have already seen, the Government did not offer this proof under a Walder rationale. Also, the evidentiary basis upon which the Government offered this proof was rejected by this Court on appeal. As Judge Mansfield, who concurred with the majority observed: "Nor can I agree with

^{*} References are to the pages of appellant's appendix.

the majority that the introduction of this evidence [similar acts] may be disregarded on the ground that it might have been introduced to impeach Benedetto's credibility, since it was not presented, received, or explained to the jury in those terms, and there was therefore no requirement that Benedetto ask for the limiting instruction to which he would have been entitled if such a ground had been advanced." Slip op. at 1745.

In short, proof of "similar acts" cannot be condoned under Walder v. United States, since limiting instructions under Walder were never explained to the jury.

II.

Another reason why the Court should grant rehearing in this case, or even rehearing en banc, is that the decision in United States v. Benedetto is hopelessly inconsistent with the decision in the companion case of United States v. Gubelman, the two cases having reached contradictory results with respect to whether the Government can offer proof of "similar acts" to rebut the defense that the witnesses for the Government incorrectly identified the defendant as the perpetrator in question.

The Court's opinion in Gubelman states that this issue was not resolved in Benedetto, slip op. at 1752, n.12, but the proposition is by no means free from doubt, a point

Judge Mansfield was quick to recognize in his dissenting opinion in Gubelman. Slip op. at 1954-56. Compare United States v. Gubelman, slip op. at 1750-51 with United States v. Benedetto, slip op. at 1742-43. There ought to be a clear resolution of the issue, but it appears that considerable confusion exists even after the decisions in Benedetto and Gubelman.

Indeed, the opinions in both cases, when read together, raise a very serious question concerning how far the Government can go in proving its own case or countering a defense raised by the accused. Even if the opinions are not in conflict on this point, rehearing or rehearing en banc should nevertheless be ordered to reconsider the incorrect holding in Gubelman that proof of similar acts may be offered to rebut the defense of mistaken identification. Indeed, if this holding reflects the law of the United States Court of Appeals for the Second Circuit, then the law ought to be changed. For there would be no limits, whatsoever, on the Government's use of "similar acts". If such proof can be offered to establish the defendant's identity, then it can be offered whenever the defense happens to claim that an element of the Government's case is missing.

Thus, proof of "similar acts" would be appropriate where the defendant offered the defense of alibi, if the defendant showed that a witness had a motive to lie, for

example where the witness had been promised a suspended sentence in return for his testimony, or in response to any defense raised at trial. Gubelman thus suggests that when the defendant claims he is innocent, the Government is entitled to show that he committed prior acts similar to those charged in the indictment. This is not the law, and Benedetto was thought to have rejected this sort of use of "similar acts" proof as too broad.

When identity is put in issue at trial, there must be more than a mere general similarity between the uncharged crime and the crime charged in the indictment for the former to be admissible in the prosecution for the latter. Generally similar uncharged crimes establish not the identity of the accused but only that the accused has a propensity for crime. "There must be some unique and specific characteristic common to both the uncharged act and the alleged criminal conduct, such as a similarity in the modus operandi, before the earlier act may be admitted on the issue of identity." United States v. Gubelman, slip op. at 1754 (Mansfield, J., dissenting). It is only under these circumstances that the uncharged crimes could even be relevant to identity. An example of such a case is People v. Allweiss, A.D.2d (1st Dept. 1978), N.Y. L. Jour., January 26, 1978, p. 1, col. 2, in which it was held that the modus operandi reflected in six uncharged rape crimes was sufficiently unique to allow these offenses to be offered in a murder prosecution.

The Court acknowledged that there were at least five unique characteristics common to both the rape offenses and the murder charge.*

No such similar analysis is possible in the present case, for the crimes involved here, receiving bribes, had no unique characteristics.

In sum, rehearing or rehearing en banc is appropriate in this case.

CONCLUSION

THE PETITION FOR REHEARING SHOULD BE GRANTED.

Respectfully submitted,

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* They were that the defendant followed the victim, usually single, to her apartment, he employed a ruse to gain admission into the apartment, he forced compliance with his demands by seizing the victim by the throat and threatening her with a knife, there was manual contact with the victim's lingerie, and the defendant stole property from the victims' apartments.